IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN AYANBADEJO, *et al.*, Plaintiffs,	§	
	§	CIVIL ACTION NO. H-06-1177
v.	§	
JANET NAPOLITANO, *et al.*, Defendants.	§	

MEMORANDUM AND ORDER

The plaintiffs, John Ayanbadejo and Felicia Malveaux Ayanbadejo, filed this action for declaratory relief against Janet Napolitano in her official capacity as Secretary of the United States Department of Homeland Security and Acting District Director Ray Adams of the United States Citizenship and Immigration Services ("USCIS").[1] This case was remanded by the Fifth Circuit for further review of an adverse decision by USCIS on an immigrant visa petition to classify Mr. Ayanbadejo as the spouse of a United States citizen. *See Ayanbadejo* v. *Chertoff*, 517 F.3d 273, 277-78 (5th Cir. 2008). The defendants have provided the administrative record under seal and they have filed a motion for summary judgment. (Docs. # 52, # 58). The plaintiffs have filed a response. (Doc. # 62). After considering all of the pleadings, and the applicable law, the Court grants the defendants' motion and dismisses this case for reasons that follow.

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[1] Originally, the plaintiffs filed suit against Michael Chertoff, as Secretary of the Department of Homeland Security, and Sharon Hudson, as District Director of the United States Citizenship and Immigration Services. Chertoff has been replaced by Janet Napolitano and Hudson has been replaced by Ray Adams. Because the plaintiffs sue these defendants in their official capacities, the Court substitutes Napolitano and Adams as the proper parties pursuant to Rule 25 (d) of the Federal Rules of Civil Procedure.

I BACKGROUND

The background and procedural history of this case has been set forth previously in the Court's *Memorandum and Order* dated September 21, 2006 [Doc. # 25] and will not be repeated at length here. It is sufficient to note that the plaintiffs seek declaratory relief from an adverse decision on an immigrant visa petition that was filed by Felicia Malveaux Ayanbadejo ("Felicia" or "Felicia Malveaux") on behalf of her spouse, John Ayanbadejo ("John"). The administrative record compiled in connection with the plaintiffs' visa petition is summarized briefly below. [Doc. # 52].[2]

John is a native and citizen of Nigeria. He arrived in the United States with a temporary, non-immigrant visa on December 18, 1996, to visit siblings in Houston, Texas. During his visit to Houston, John met Felicia Malveaux. At that time, Felicia resided in Beaumont, Texas, where she worked as a restaurant manager. The record reflects that John's temporary visa was set to expire on March 5, 1997. [AR at 154]. Shortly before that time, on February 10, 1997, John and Felicia were married by a justice of the peace in Harris County. [ARat446].

As a United States citizen, Felicia promptly filed a Form I-130 "Petition for Alien Relative" (an "I-130 Petition") on March 3, 1997, to obtain an immigrant visa for John as her spouse or "immediate relative."[3] John and Felicia were interviewed separately by an

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[2] Hereafter, all references to the Administrative Record [Doc. # 52] will be cited as "AR."

[3] *See* 8 U.S.C. § 1154 (a)(l)(A)(i) (providing that "any citizen of the United States claiming that an alien is entitled to ... an immediate relative status ... may file a petition with the

(continued...)

adjudications officer on December 16, 1999. Thereafter, the adjudications officer requested additional proof that the couple had been co-habitating since the marriage. [AR at 362]. Investigation revealed that John and Felicia were living at separate residences in Houston and Beaumont, respectively.

In October of 2000, John moved to New York while Felicia remained in Beaumont. The District Director issued a notice of intent to deny the I-130 Petition on December 5, 2000.[4] [AR at 229]. In that notice, the Director concluded that John and Felicia did not have a bona fide marriage and that John was not eligible for the immediate relative visa because it appeared that he had entered into a "fraudulent marriage" for the purpose of obtaining an immigration benefit. *[Id.]*. Thereafter, on April 17, 2001, Felicia filed a second 1-130 Petition for an immediate-relative visa on John's behalf. John and Felicia had a second interview with an adjudications officer on January 8, 2002. After considering affidavits from John and Felicia, as well as additional documentation, the USCIS issued a notice of intent to deny Felicia's second I-130 Petition. In that notice, which is dated June 26, 2002, the Acting District Director found that there was insufficient proof that the marriage was valid for purposes of establishing eligibility for the immediate relative visa:

> Service records reveal [that] you and your [husband] appeared for an interview on January 08, 2002. At that time you stated that on December 16, 1999 you

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[3] (...continued)
Attorney General for such classification"); 8 U.S.C. § 1151 (b)(2)(A)(i) (defining "immediate relative" to include a United States citizen's spouse).

[4] The Court takes judicial notice that Beaumont is located 88 miles from Houston. *See* RAND MCNALLY, ROAD ATLAS: UNITED STATES, CANADA, & MEXICO 98 (2001 ed.).

appeared for an interview regarding your initial filing. At that interview you were requested to submit additional documentation in order to establish eligibility for the benefit sought. The Service received your documentation and determined that it was insufficient. On December 5, 2000 the Service issued a notice of intent to deny the visa petition. Although you submitted additional documentation in response to that notice, on April 17, 2001, you filed another Form I-130. At your second interview you acknowledged that you have been living in Beaumont, Texas but your spouse [John] has been living in New Jersey since October 2001. He previously resided in New York City from October 2000 until October 2001. During that time, you remained in Beaumont. You have not visited your husband in New York or New Jersey. Your spouse stated that he visits Houston and submitted evidence of flights to and from Houston. No evidence was presented showing who he visited and where he stayed on those visits to Houston. You have previously stated, in writing, that your spouse has a brother and other family members who live in Houston. Additional evidence is not supportive of a viable marriage. For example, the monthly statement from your joint checking account at United Bank showed no activity for the month. The cancelled checks you submitted were written to you and signed by you. The evidence submitted fails to establish eligibility for the benefit sought.

[AR at 146]. Based on these findings, the Acting District Director issued his notice of intent to deny the I-130 Petition because he had "reason to believe" that the union was "fraudulent" and entered into solely "for immigration purposes." [AR at 147].

Felicia filed a response to the June 26, 2002 notice of intent and she reportedly presented additional documentation.[5]

[5] A careful review of the administrative record reflects that much of the documentation presented by John and Felicia duplicated information that had been provided previously. [Doc. # 52]. In that respect, the administrative record contains multiple copies of John's tourist visa, the marriage certificate, Felicia's lease agreement for her apartment in Beaumont, John's employment records, tax returns, bank statements, plane tickets, photographs, and other miscellaneous information. Because the same documents appear repeatedly throughout the record, it appears that the same documents were submitted more than once.

On October 9, 2002, the USCIS found that the evidence presented was insufficient to establish that John and Felicia had a bona fide intent to enter into a valid marital relationship:

> At the time of [the January 8, 2002] interview, you acknowledged that you reside in Beaumont, Texas and that your husband has been living in the New York/New Jersey area since October 2000. You acknowledged that you have never visited your husband in New York, or New Jersey since he moved there almost two years ago. Although your husband has made trips to Houston, you have failed to provide evidence of any contact with your husband during those visits. You stated that your husband's family lives in Houston and that he frequently stayed there (not with you in Beaumont) prior to his move out of state. You provided no evidence of telephonic communication with your spouse, such as long distance telephone bills. Your "letters" to your spouse consisted of one three-sentence note stating that you were forwarding income tax papers to his New York address. That letter was postmarked AFTER the interview. The evidence you have submitted fails to establish eligibility for the benefit sought. You have provided insufficient evidence that a bona fide husband-wife relationship was intended.

[AR at 20 (emphasis in original)]. Therefore, the Acting District Director denied the I-130 Petition based on the finding that the marriage was entered into "for the purposes of circumventing immigration law." [ARat21]. On June 16, 2005, the Board of Immigration Appeals ("BIA") affirmed the decision without a written opinion. [AR at 3].

The plaintiffs now seek a judgment declaring that immigration officials wrongfully denied the I-130 Petition for an immediate relative visa that was filed by Felicia on John's behalf.[6]

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[6] Originally, the plaintiffs also requested declaratory, injunctive, and mandamus relief from an adverse decision on a Form I-485 "Application to Register Permanent Residence or Adjust Status" (an "I-485 Application") that John filed on his own behalf to adjust his status from a non-immigrant visitor to a lawful permanent resident under 8 U.S.C. § 1255(a). This Court dismissed those claims previously for lack of subject matter jurisdiction and the Fifth Circuit affirmed that decision. *See Ayanbadejo v. Chertoff, 511* F.3d 273, 276-77 (5th Cir.

(continued...)

In particular, the plaintiffs argue that immigration officials denied the petition in reliance on information that was "rebutted and shown to be demonstrably false" and "mischaracterized evidence" that was "truthfully given" by Felicia. [Doc. # 1, Complaint, at [4]. The plaintiffs explain that they were "temporarily living apart" because of ordinary "career choices" and that they "still communicated like other couples similarly situated." *[Id],* Therefore, the plaintiffs seek a declaration that the defendants' decision to deny the I-130 Petition was unlawful.

The defendants have filed a motion for summary judgment, arguing that the plaintiffs failed to present the requisite evidence to establish their intent to enter into a bona fide marriage or to show that the administrative decision to deny the I-130 Petition was arbitrary, capricious, or contrary to the law. [Doc. # 58]. The plaintiffs disagree. [Doc. #62]. The parties' contentions are discussed below under the governing standards of review

II. STANDARDS OF REVIEW

A. Summary Judgment

The defendants have filed a motion for summary judgment, arguing that the plaintiffs' claims fail as a matter of law. Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing of the existence of an element essential to the party's case, and on which that party will bear the burden at trial. *Celotex Corp.* v. *Catrett,* 477 U..S. 317, 322 (1986); *Little v. Liquid Air Corp.,* 37F.3d 1069, 1075 (5th Cir. 1994) (en

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[6] (...continued)
2008).

banc). In deciding a motion for summary judgment, a reviewing court must determine whether the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56 (c); *Celotex Corp.*, 477 U.S. at 322-23.

For summary judgment, the initial burden falls on the movant to identify areas essential to the non-movant's claim in which there is an "absence of a genuine issue of material fact." *Lincoln Gen. Ins. Co.* v. *Reyna*, 401 F.3d 347, 349 (5th Cir. 2005). The moving party, however, need not negate the elements of the non-movant's case. *Boudreaux* v. *Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005). The moving party may meet its burden by pointing out "'the absence of evidence supporting the nonmoving party's case.'" *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995) (quoting *Skotak* v. *Tenneco Resins, Inc.*, 953 F.2d 909, 913 (5th Cir. 1992)).

If the moving party meets its initial burden, the non-movant must go beyond the pleadings and designate specific facts showing that there is a genuine issue of material fact for trial. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (internal citation omitted). The non-movant must do more than simply show that there is some "metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "An issue is material if its resolution could affect the outcome of the action. A dispute as to a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party" *DIRECTV Inc. v. Robson*, 420 F.3d 532, 536 (5th Cir. 2006) (internal citations omitted).

B. Review of Administrative Decisions

A reviewing court may only set aside an administrative decision where the plaintiff establishes that the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also City of Dallas, Tex.* v. *Hall*, 562 F.3d 712,717 (5th Cir. 2009) (citing *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 375-76 (1989); *Kleppe* v. *Sierra Club, All* U.S. 390, 412 (1976)). Review under this standard is "narrow and highly deferential, requiring only that the agency 'articulate a rational relationship between the facts found and the choice made.'" *City of Abilene* v. *EPA*, 325 F.3d 657, 664 (5th Cir. 2003) (citations and quotation omitted). Under this deferential standard, the reviewing court may not substitute its own judgment for that of the agency. *Id.*

The agency at issue in this case, the USCIS, enjoys broad discretion in deciding whether to grant or deny visa petitions. *See Louisiana Philharmonic Orchestra* v. *INS*, 44 F. Supp. 2d 800, 802 (W.D. La. 1999) (citation omitted). In considering the evidence in this case, the Court is limited to reviewing the administrative record which went before the Board of Immigration Appeals or BIA. *See Camp* v. *Pitts*, 411 U.S. 138, 142 (1973); 5 U.S.C. § 706(2)(E). To uphold the BIA's decision, the defendants must show that the District Director's factual finding that the plaintiffs' marriage was a sham is supported by "substantial evidence" in the record. *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992); *Mikhael* v. *INS*, 115 F.3d 299, 302 (5th Cir. 1997). This "requires only that the BIA's decision be supported by record evidence and be substantially reasonable." *Omagah* v. *Ashcroft*, 288 F.3d 254, 258 (5th Cir. 2002) (citing *Mikhael*, 115 F.3d at 302). For the

plaintiffs to prevail, by contrast, they must demonstrate that the evidence they presented to the District Director was so compelling that "no reasonable fact finder" could fail to find that they had a bona fide marriage. *Syed v. Ashcroft*, 389 F.3d248, 251 (1st Cir. 2004) (citations and internal quotations omitted). The administrative record is reviewed below in connection with the law governing immigrant visas for the spouse or immediate relative of a United States citizen.

III. DISCUSSION

As outlined above, the administrative decision at issue concerns the denial of an I-130 Petition to classify John as Felicia's spouse and therefore her immediate relative for the purpose of securing an immigrant visa. According to the statute governing immediate-relative visas, any United States citizen claiming that an alien is entitled to "immediate relative status" under 8 U.S.C. § 1151 (b)(2)(A)(i) may file a petition, *i.e.*, an I-130 petition, with the Attorney General for such classification. 8 U.S.C. § 1154(a). Once an I-130 petition is filed, the Attorney General is directed to investigate and, if appropriate, approve the petition "if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made" qualifies as an "immediate relative" as that term is defined by law. 8 U.S.C. § 1154 (b).

In this case, the reviewing official concluded that John failed to qualify as an immediate relative under 8 U.S.C. § 1151 (b) (2) (A) (i) because the plaintiffs failed to present sufficient proof that their marriage was bona fide. In other words, the official denied the I-

130 Petition based on his conclusion that the plaintiffs' union was a fraudulent or "sham marriage" entered into for purposes of circumventing the immigration laws.

The statute governing immediate relative visas contains an express limitation which provides that, if immigration officials determine that a marriage was not entered into in good faith, but was instead a sham marriage entered into for the purpose of evading immigration laws, then the visa petition must be denied. 8 U.S.C. § 1154(c).[7] In visa petition proceedings, the petitioner bears the "burden of proof to establish eligibility for the benefit sought." *Matter of Brantigan*, 11 I. & N. Dec. 493, 493 (BIA 1966). In particular, where a petitioner seeks an immediate-relative visa for a spouse, the petitioner must prove "by a preponderance of evidence that [the petitioner] and the beneficiary intended to establish a life together at the time of their marriage." *Matter of Pazandeh*, 19 I. & N. Dec. 884, 887 (BIA 1989) (citing *Matter of McKee*, 17 I. & N. Dec. 332 (BIA 1980)); *see also Bark v. INS*, 511 F.2d 1200, 1201 (9th Cir. 1975). Where the legitimacy of a marriage is called into question,

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[7] The statute that prohibits an immediate-relative visa where a fraudulent marriage is shown states as follows:

> Notwithstanding the provisions of subsection (b) of this section no petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws, or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

8 U.S.C. § 1154(c).

the petitioner must present documentary or testimonial evidence to show that it was not entered into for the primary purpose of evading the immigration laws. *See Matter of Phillis,* 15 I. & N. Dec. 385, 386 (BIA 1975). In this context, a petitioner is encouraged to present evidence including, but not limited to, "proof that the beneficiary has been listed as the petitioner's spouse on any insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences." *Id.* at 387; *see also Matter of Laureano,* 19 I. & N. Dec. 1, 1 (BIA 1983) (same). The plaintiffs maintain that they met their burden of proof at the administrative level and that the defendants' decision to deny the I-130 Petition was arbitrary, capricious, and contrary to the law.

Following their interview with an adjudication officer on December 16, 1999, the plaintiffs were asked to provide proof of co-habitation since their February 10,1997 marriage by supplying evidence of the following: (1) receipts in both names for purchases of wedding rings, furniture, cars or appliances; (2) home or business purchases or rental leases in both names; (3) bank, savings accounts, and credit card statements in both names; (4) insurance for business, cars, health, or life in both names; (5) utilities statements in both names, bills in both names, personal mail at the same address (not bulk mailings); and (6) income tax records showing joint filings. [AR at 362]. The administrative record shows that the plaintiffs' submission fell far short of the level of proof that was requested.

Although there is one receipt for a mattress in John's name, with Felicia's name added as an afterthought, the record contains no joint receipts for any other purchases. [AR at 339].

There is no evidence that the plaintiffs purchased or leased a home together at any time. The record shows that, after their marriage on February 10, 1997, Felicia continued to reside in Beaumont, Texas, where she had been employed as a restaurant manager since 1987. [AR at 421, 428]. While Felicia continued to maintain her own apartment in Beaumont, John's Texas Driver License confirms that his official residence was in Houston, where he was reportedly employed as a temporary worker, a data entry clerk, or a "credit coordinator." [AR at 420, 453-54]. Although John claims that he lived with Felicia on the weekends, his name was not added to the lease as a co-tenant or resident when Felicia renewed the lease in 1998. [AR at 402]. There is no evidence showing that John was ever added to Felicia's lease. Likewise, there are no utility statements or other bills in both John and Felicia's names. Thus, there is no documentary proof that the two shared a residence following their marriage.

The record also contains little evidence of commingled financial assets following the marriage. John and Felicia filed separate income tax returns for 1997. [AR at 410-11,451-52]. There are no income tax returns in the record for 1998 or 1999. There are isolated bank statements showing that John and Felicia maintained accounts in both of their names in Houston and in Beaumont but, as immigration officials observed, there is no meaningful activity showing that the accounts were being jointly used. John and Felicia purchased life insurance policies for each other in 1999. [AR at 294-95]. The following year, however,

John moved from Texas to New York, where he passed the bar exam,[8] and obtained employment as a contract attorney for a state agency. [AR at 233,381-82]. John and Felicia filed a joint tax return in 2000. [AR at 290-95]. John listed Felicia as a beneficiary on his New York State retirement account in 2001, showing that she continued to reside in Beaumont while he lived in New York.[9] [AR at 298-99].

In his affidavit, dated January 24, 2001, John explained that he was working in New York, but that he would "occasionally" return to Beaumont to spend time with Felicia "on holidays and vacation days." [AR at 233]. John provided a few airline receipts, which purport to document trips to Houston in 2000 and 2001. [AR at 300-308]. There is no evidence, however, showing that John traveled to Beaumont or that he spent time with Felicia during these trips. Likewise, there is no evidence of written or telephonic correspondence, showing that John and Felicia communicated on a regular basis during the extended time that they lived apart. Based on this record, the District Director found that the

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8 John has a foreign law degree from an undisclosed university. In an affidavit dated July 17, 2002, Felicia explained that John was not eligible to take the Texas Bar Exam until he had practiced law fur five years as an attorney in his home country or for three years as an attorney in the United States. [AR at 24]. Felicia said that John planned to practice in New York for three years before returning to Texas to live with her. *[Id.]*. John was admitted to the New York Bar in 2000. It is unclear whether he has taken the Texas Bar Exam or that he has been admitted to practice law here. It is likewise unclear whether John and Felicia are currently together. The Court notes that John appeared for the scheduling conference that was held on December 12, 2008, but that Felicia did not. Likewise, John is the only plaintiff who submitted a signed statement in support of the response to defendants' motion for summary judgment. [Doc. # 62, Ex. 1].

9 In June of 2001, John obtained employment as a hearing officer with the "New York State Office of Temporary and Disability Assistance, Office of Administrative Hearings." [AR at 205].

plaintiffs provided "insufficient evidence that a bona fide husband-wife relationship was intended" and denied the I-130 Petition, concluding that the marriage was a sham. [AR at 20-21].

In the immigration context, a marriage is considered a sham if the bride and groom did not intend to establish a life together at the time they married. *See Syed v. Ashcroft*, 389 F.3d 248,252 (1 st Cir. 2004) (citing *Bark* v. *INS*, 511 F.2d 1200, 1201 (9th Cir. 1975)). The conduct of the parties after marriage is relevant to their intent at the time of marriage. *Bark*, 511 F.2d at 1202. Such conduct is relevant "only to the extent that it bears upon [the plaintiffs'] subjective state of mind at the time they were married." *Id.* (citing *Lutwak v. United States*, 344 U.S. 604 (1953)). Likewise, evidence of post-marital separation is relevant, but not dispositive of intent. *See Bark*, 511 F.2d at 1202. "Of course, the time and extent of separation, combined with other facts and circumstances, can and have adequately supported the conclusion that a marriage was not bona fide." *Id.*

The record in this case demonstrates that the plaintiffs have maintained separate homes and lives throughout their marriage. The evidence shows that, for much if not most of the marriage, the plaintiffs have resided and worked in different cities and, in fact, different states. The fact that the plaintiffs lived separately for most of their marriage, however, was not the only factor relied upon by the District Director when he denied the visa petition. As the District Director noted, there was little evidence, and none convincing, that the plaintiffs commingled their assets. Likewise, there was scant evidence that the two communicated or visited each other during the extensive time they lived apart. Indeed, much

of the meager proof ultimately presented post-dated the interview with the adjudication officer and appeared contrived. Therefore, the record contains substantial evidence to support the District Director's finding that the plaintiffs failed to establish a bona fide marriage or to show that John was entitled to the benefit sought. The plaintiffs have failed to demonstrate that the evidence compels a contrary conclusion or that the two plaintiffs intended to establish a life together under the governing standard. *See, e.g., Bark,* 511 F.2d at 1201. It follows that the plaintiffs have also failed to meet their burden to show that John is eligible for an immediate relative visa. *See National Hand Tool Corp.* v. *Pasquarell,* 889 F.2d 1472, 1475 (5th Cir. 1989) (stating that the plaintiff bears the burden of proving his eligibility for the requested visa).

Based on this sparse record, the plaintiffs have also failed to show that the agency decision at issue was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 5 U.S.C. § 706(2) (A). Because the evidence does not compel a conclusion contrary to the District Director's findings, and the agency's decision was neither arbitrary nor capricious, a reversal of the agency's ultimate decision is not warranted

in this case.[10] *See Elias-Zacarias*, 502 U.S. at 481. The defendants' motion for summary judgment will be granted, and the complaint for declaratory relief will be dismissed.

IV. CONCLUSION AND ORDER

Based on the foregoing, the Court **ORDERS** as follows:

1. The defendants' motion for summary judgment [Doc. # 52] is **GRANTED.**

2. This case is **DISMISSED** with prejudice.

The Clerk shall provide a copy of this order to the parties.

SIGNED at Houston, Texas on September 15th, 2009.

NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

Nancy F. Atlas
United States District Judge

[10] The complaint contains an allegation that the I-130 Petition was denied in violation of the plaintiffs' right to due process because they were not afforded the opportunity to "present evidence, including live witnesses, to cross-examine, the right to subpoena witnesses and documents, [and] the right to inspect the record of proceedings, etc." [Doc. # 1, at ¶ 5]. These allegations are entirely belied by the record. The plaintiffs were afforded ample opportunity to present evidence in support of both the initial I-130 Petition and the second I-130 Petition filed by Felicia on John's behalf. After considering both petitions and the plaintiffs' evidence, immigration officials determined that the plaintiffs failed to produce sufficient evidence to establish that a bona fide marriage. The plaintiffs fail to establish a due process or other constitutional violation in connection with this decision and the record does not disclose one. Therefore, the Court will not address this allegation further.

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FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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Plaintiffs,	§	
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	§	
v.		
JANET NAPOLITANO, *et al.*,	§	
Defendants.	§	

FINAL JUDGMENT

For the reasons set forth in the Court's *Memorandum and Order* of even date, the defendants' motion for summary judgment [Doc. #52] is **GRANTED** and this case is **DISMISSED** with prejudice.

This is a **FINAL JUDGMENT.**

The Clerk shall provide a copy of this order to the parties.

SIGNED at Houston, Texas, on September 15th, 2009.

NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

Nancy F. Atlas
United States District Judge

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	§	
Defendants.	§	

ORDER

The plaintiffs, John Ayanbadejo and Felicia Malveaux Ayanbadejo, filed this action for declaratory relief from an adverse administrative decision on John Ayanbadejo's immigrant visa petition as the spouse of a United States Citizen. On September 15, 2009, the Court granted the defendants' motion for summary judgment and dismissed this case after finding that the plaintiffs were not entitled to relief. According to Rule 4(a) of the Federal Rules of Appellate Procedure, the plaintiffs' notice of appeal was due no later than October 15, 2009. On March 31, 2010, the plaintiffs filed a motion to reopen the time to appeal. [Doc. *# 66]*. On April 2, 2010, the plaintiffs filed an amended motion to reopen the time for appeal. [Doc. # 67]. On that same date, the plaintiffs filed their notice of appeal. [Doc. # 68]. The defendants have filed a response. [Doc. # 70]. The motion is **denied** for reasons set forth briefly below.

There are two avenues in Rule 4(a) of the Federal Rules of Appellate Procedure "for rescuing [an] appeal through a late-filed notice of appeal." *Resendiz* v. *Dretke*, 452 F.3d 356,

358 (5th Cir. 2006) (citing *Wilkens* v. *Johnson*, 238 F.3d 328, 330 (5th Cir. 2001)). A prospective appellant may file a motion for an extension of time under Rule 4(a)(5) or he may seek to re-open the time to appeal under Rule 4(a)(6). Neither option aids the plaintiffs in this instance.

Rule 4(a)(5) provides that a district court "may extend the time to file a notice of appeal if: (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause." Because the plaintiffs did not request an extension of time to appeal within sixty days of entry of judgment, Rule 4(a)(5) is not available.

Under Rule 4(a)(6), a district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all of the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

FED. R. APP. P. 4(a)(6). The defendants argue that the plaintiffs fail to satisfy any of the conditions and that an extension is not justified. The Court agrees for reasons that follow.

The plaintiffs do not meet the first condition, which is set forth in Rule 4(a)(6)(A).

Rule 77(d)(1) of the Federal Rules of Civil Procedure requires the Clerk's Office to serve notice of an order or judgment "immediately" and to record such service on the docket. The docket reflects that the order granting summary judgment in favor of the defendants and the final judgment were provided to the parties on September 15, 2009, and that the parties were notified through their counsel of record. [Docs. #64, #65]. According to the plaintiffs, their former counsel (Salvador Colon), received the final judgment but did not send them a copy because he believed that he had been "fired" from the case. [Doc. #67, Ex. A, at ¶ 15]. Nevertheless, because the notice of the final judgment was provided to the plaintiffs through their counsel of record, the plaintiffs fail to satisfy Rule 4(a)(6)(A). *See Resendiz*, 452 F.3d at 362 (observing that notice to counsel of record is imputed to the party).

Even assuming that the plaintiffs did not receive notice of the final judgment, the plaintiffs do not satisfy the second requirement found in Rule 4(a)(6)(B) because they did not file a motion to re-open within the time allowed. The plaintiffs allege that they received notice of the final judgment on March 29, 2010, and filed their motion to re-open 3 days later on March 31, 2010. However, the Court issued its final judgment on September 15, 2009. The 180-day time period to reopen expired on Monday, March 15, 2010. As set forth above, Rule 4(a)(6)(B) requires that the motion to re-open be filed within 180 days of the judgment or within 14 days after receiving notice, "whichever is *earlier.*" FED. R. APP. P. 4(a)(6)(B) (emphasis added). Because the 180-day time period expired before they received notice, they are not eligible for additional time under Rule 4(a)(6).

The plaintiffs offer no valid explanation for their failure to learn of the dismissal

within the time allowed. Although the plaintiffs assert that their former counsel of record (Salvador Colon) was negligent for failing to give timely notice of the final judgment, Mr. Ayanbadejo reports that he is a licensed attorney who is admitted to the United States District Court for the Southern District of Texas. [Doc. # 67, Ex. A]. Mr. Ayanbadejo was present at the scheduling conference on December 12, 2008, and he knew that the defendants were planning to file a summary judgment motion. [Doc. # 50]. The defendants filed their motion for summary judgment on February 6,2009, and Mr. Ayanbadejo filed a personal declaration in response on February 27, 2009. [Docs. # 58, # 60]. Mr. Ayanbadejo does not explain why he waited more than a year, until March of 2010, to enquire whether there had been a decision on the summary judgment motion.

This Court possesses no equitable power to extend the appellate deadlines. *See Oja* v. *Department of the Army,* 405 F.3d 1349, 1358 (Fed. Cir. 2005) (finding that Rule 4(a) is "not subject to equitable tolling"); *Clark v. Lavallie,* 204 F.3d 1038, 1040 (10th Cir. 2000) ("[Nothing within Rule 4(a)(6) indicates it is permissive or that its limitations may be waived for equitable reasons."); *United States ex rel. McAllan v. City of New York,* 248 F.3d 48, 53 (2d Cir. 2001) ("[T]he district court has no equitable powers to alter appellate timelines[.]"), *cert, denied,* 535 U.S. 929 (2002). Likewise, the federal rules provide no remedy, equitable or otherwise, to extend the appellate deadlines in this case.

Accordingly, it is **ORDERED** that the motion for an extension of time [Doc. # 66] and the amended motion for an extension of time to reopen [Doc. # 67] are **DENIED.**

The Clerk will provide copies of this order to the parties.

SIGNED at Houston, Texas on April 6th, 2010.

Nancy F. Atlas
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN AYANBADEJO, *et al.*,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	H-06-1177
JANET NAPOLITANO, *et al.*,	§	
	§	
Defendants.	§	

ORDER

On September 15, 2009, this Court granted the defendants' motion for summary judgment and dismissed the declaratory judgment action filed by the plaintiffs, John Ayanbadejo and Felicia Malveaux Ayanbadejo, regarding an adverse administrative decision on an immigrant visa petition. According to Rule 4(a) of the Federal Rules of Appellate Procedure, the plaintiffs' notice of appeal was due no later than October 15, 2009. The plaintiffs filed their notice of appeal on April 2, 2010. In an order entered on April 6, 2010, the Court entered an order denying the plaintiffs' motion to reopen the time to appeal. [Doc. # 72]. Later that same day, the plaintiffs filed a new notice of appeal and a motion for an extension of time in which to file an amended notice of appeal. [Docs. # 74, # 76]. The defendants have filed a response, to which the plaintiffs have filed a reply. [Docs. # 80, #81]. The plaintiffs' motion will be denied for reasons set out briefly below.

As explained previously in the Court's order dated April 6, 2010, there are only two avenues in Rule 4(a) of the Federal Rules of Appellate Procedure "for rescuing [an] appeal

through a late-filed notice of appeal." *Resendiz* v. *Dretke*, 452 F.3d 356, 358 (5th Cir. 2006) (citing *Wilkens* v. *Johnson*, 238 F.3d 328, 330 (5th Cir. 2001)). A prospective appellant may file a motion for an extension of time under Rule 4(a)(5) or he may seek to re-open the time to appeal under Rule 4(a)(6). For reasons outlined in the Court's previous order, the plaintiffs have not established that they qualify for an extension under either Rule 4(a)(5) or Rule 4(a)(6). Nor have the plaintiffs shown that the Court's previous order was incorrect.

The plaintiffs fail to show that they are entitled to an extension under any theory. Accordingly, it is **ORDERED** that the plaintiffs' motion for an extension of time to file an amended notice of appeal [Doc. # 76] is **DENIED.**

The Clerk will provide copies of this order to the parties.

SIGNED at Houston, Texas on April 21, 2010.

NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

Nancy F. Atlas
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN AYANBADEJO, *et al.*,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	H-06-1177
JANET NAPOLITANO, *et al.*,	§	
	§	
Defendants.	§	

ORDER

On September 15, 2009, this Court granted the defendants' motion for summary judgment and dismissed the declaratory judgment action filed by the plaintiffs, John Ayanbadejo and Felicia Malveaux Ayanbadejo, regarding an adverse administrative decision on an immigrant visa petition. The plaintiffs have filed a joint motion to recuse the undersigned. [Doc. # 88]. The plaintiffs have filed a separate joint motion to disqualify Mr. Ayanbadejo's retained counsel, Salvador Colon. [Doc. # 89]. The motions are denied for reasons set forth briefly below.

The record reflects that this case is presently on appeal to the Fifth Circuit. Under these circumstances, this Court's jurisdiction is limited to those actions taken in aid of the appeal. *See Rutherford v. Harris County, Tex.*, 197 F.3d 173, 190 (5th Cir. 1999)(explaining that, "[o]nce an appeal is taken, the district court is divested of jurisdiction except to take action in aid of the appeal until the case is remanded to it by the appellate court, or to correct clerical errors under Rule 60(a)") (quoting *Travelers Ins. Co.* v. *Liljeberg Enters., Inc.*, 38

F.3d 1404, 1407 n.3 (5th Cir. 1994)). Neither motion meets that criteria.

Accordingly, it is **ORDERED** that the plaintiffs' pending motions [Docs. # 88, # 89] are **DENIED** for lack of jurisdiction.

The Clerk will provide copies of this order to the parties.

SIGNED at Houston, Texas on July 9, 2010.

NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

Nancy F. Atlas
United States District judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN AYANBADEJO and FELICIA MALVEAUX AYANBADEJO, Plaintiffs,	§ § §	
v.	§	CIVIL ACTION NO.
	§	H-06-1177
MICHAEL CHERTOFF, *et al.*, Defendants.	§ §	

ORDER

On September 21, 2006, this Court granted the defendants' motion to dismiss for lack of subject matter jurisdiction. The plaintiffs have filed a "Motion for New Trial," which the Court construes as a motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Doc. # 27). They have also filed a memorandum of law in support of that motion. (Doc. # 28). The plaintiffs' motion is **denied** for reasons that follow.

A Rule 59(e) motion may be granted if the moving party demonstrates any of the following: (1) the judgment was based upon a manifest error of law or fact; (2) there is newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; and (4) there is an intervening change in controlling law. *See* 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2810.1 (2d ed. 1995). Altering, amending, or reconsidering a judgment under Rule 59(e) is an extraordinary measure, which courts should use sparingly. *See id.; In the Matter of Self,* 172 F. Supp. 2d 813, 815 (W.D. La. 2001). With respect to the extraordinary nature of this remedy, the Fifth Circuit has

found that the Rule 59(e) standard "favors denial of motions to alter or amend a judgment." *Southern Constructors Group, Inc.* v. *Dynalectric Co., 2* F.3d 606, 611 (5th Cir. 1993); *see also Simon v. United States,* 891 F.2d 1154, 1159 (5th Cir. 1990) ("Motions for a new trial or to alter or amend a judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence. These motions cannot be used to raise arguments which could, and should, have been made before the judgment issued. Moreover, they cannot be used to argue a case under a new legal theory."). As such, "the district court has considerable discretion in deciding whether to reopen a case in response to a motion for reconsideration arising under [Rule *59(e)]." Lavespere v. Niagara Mach. & Tool Works, Inc.,* 910 F.2d 167, 174 (5th Cir. 1990).

The plaintiffs in this case sought judicial review of the denial of an immigrant visa petition for the spouse of a United States Citizen and the subsequent decision to deny an adjustment of immigration status. The plaintiffs contend that they are entitled to relief from the final judgment because this Court erred by finding that they did not have a "'real' marriage." (Doc. #28, *Memorandum* at 10). The Court made no such finding, noting only in the alternative that the plaintiffs failed to establish an abuse of discretion by immigration officials in this instance. (Doc. # 25, *Memorandum and Order,* at 14, n.4). This case was dismissed under Rule 12(b)(l) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction, pursuant to the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005), codified as amended at 8 U.S.C. § 1252(a)(2)(B), and not for reasons related to the merits of the plaintiffs' claims. The plaintiffs do not show that any

ruling by the Court was incorrect or that they are otherwise entitled to relief under Rule 59(e).

Accordingly, it is **ORDERED** that the plaintiffs' motion to alter or amend the judgment is (Doc. # 27) is **DENIED.**

The Clerk will provide copies of this order to the parties.

SIGNED at Houston, Texas on **October 4, 2006.**

Nancy F. Atlas
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN AYANBADEJO and FELICIA MALVEAUX AYANBADEJO, Plaintiffs,	§ § §	
v.	§	CIVIL ACTION
	§	NO. H-06-1177
MICHAEL CHERTOFF, *et al.*, Defendants.	§ §	

FINAL JUDGMENT

For the reasons set out in the Court's *Memorandum and Order* of even date, this case is **DISMISSED** for lack of jurisdiction.

This is a **FINAL JUDGMENT**

The Clerk will provide copies of this order to the parties

SIGNED at Houston, Texas on **September 21, 2006**

Nancy F. Atlas
United States District Judge